Filed 4/27/16 In re J.A. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re J.A., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, V. J.R., Defendant and Appellant.	E064384 (Super.Ct.No. INJ1400039) OPINION

APPEAL from the Superior Court of Riverside County. Susanne S. Cho, Judge. Affirmed.

Konrad S. Lee, under appointment by the Court of Appeal, for Defendant and Appellant.

Gregory P. Priamos, County Counsel, and James E. Brown, Guy B. Pittman and Carole Nunes Fong, Deputy County Counsel, for Plaintiff and Respondent.

Defendant and appellant J.R. (father) is the biological father of J.A. (child), the child who is the subject of this dependency proceeding. In this appeal, father contends that the trial court erred by denying his oral request for a continuance so that he could hire private counsel, and instead proceeding with the scheduled Welfare and Institutions Code[1] section 366.26 hearing, terminating his parental rights, and denying his section 388 petition. We find no abuse of discretion, and affirm the judgment.

I. FACTS AND PROCEDURAL BACKGROUND

On January 31, 2014, a section 300 petition was filed with respect to the child, then approximately one month old, and his three older half siblings.[2] The petition filed by defendant and respondent County of Riverside Department of Public Social Services (DPSS) alleged, among other things, that the child's mother abused methamphetamine throughout her pregnancy, and that both mother and child tested positive for the substance when he was born. The petition further alleged that father was not a member of the child's household, had failed to provide support or protection, and his exact whereabouts were unknown. An amended section 300 petition, filed on February 13, 2014, added the allegation that mother and father had a history of engaging in domestic violence with each other.

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[1] Further undesignated statutory references are to the Welfare and Institutions Code.

[2] The child's siblings are not at issue in this appeal, so their circumstances will be discussed only as necessary for context.

The child was detained on February 14, 2014, and adjudged to be a dependent of the court on March 3, 2014. Father did not appear at either the detention hearing or the jurisdiction/disposition hearing. The child was removed from parental custody, and placed in out-of-home care. Father was denied reunification services pursuant to section 361.5, subdivisions (a) and (b)(1), because his whereabouts were unknown.

On March 3, 2014, mother reported to a social worker that she had spoken to father within the previous two weeks, and that he would not come to court because he did not want "'to do all that stuff.'" On March 20, 2014, father contacted the social worker, stating that he wanted to come "pick up his baby." He was told that the child had been detained. He said that he had not known about court, because the mother was vague. He claimed that he had been at the hospital when the child was born, though he did not sign the birth certificate—adding that he wanted to, and that he believes he is the father of the baby. Father was told that he needed to file a request to change the court's order. He said he would come to the office; a copy of the form used to make such requests was left for him to pick up, and another copy was mailed to him. Father affirmed that he was aware of the next court date.

Father did not appear at a six-month status review conference on September 8, 2014. Apparently, he was present in the courthouse, but did not understand that the case had been called, and was out in the hallway. Later on the same date, the case was recalled, and father was present; the court found that father was unable to repay the costs of legal services rendered to him, and an attorney was appointed to represent him. The status conference was continued to September 19, 2014.

An addendum report filed by DPSS on September 16, 2014, stated that father "has known his (alleged) son was in protective custody since near the inception of this matter, but has only made efforts that resulted in contact in the last 30 days." Father appeared at the continued status review conference on September 19, 2014, with his appointed counsel. Counsel requested on father's behalf that he be found the presumed father of the child, and father filed a "Statement Regarding Parentage," requesting the court to enter a judgment of parentage. The trial court found that father "hasn't been determined to be the father," ordered DPSS to provide father with the child's birth certificate, and authorized father to visit with the child once per month. In accord with the recommendation of DPSS, the court did not set a section 366.26 hearing because DPSS needed more time to identify someone who could "provide permanency" for the child.

In a status review report filed March 4, 2015, DPSS reported that the child had been placed with new caregivers on December 30, 2014, together with his older half siblings—his fourth placement since being removed from his parents, but the only move in the previous six-month reporting period. The child was doing well in the placement, and sought out attention and love from his caregivers. Father had visited with the child three times, in December 2014, and January and February 2015. The social worker observed that father interacted with the child appropriately, and that father had been "respectful and compliant with the terms of visitation." However, in a conversation with a social worker on February 12, 2015, father expressed that he did not want to participate in services, saying that "he does not need any services and feels that he is a good parent, in spite of the domestic violence incidents that occurred in the past."

At a hearing on March 10, 2015, at which father was not present, father's counsel represented to the court that he was "doubtful" that father had signed paperwork establishing him as the father of the child, and that his name was not on the birth certificate. Counsel further represented that he had informed father that he could "'go to family support and ask for DNA testing.'" The court ordered DNA testing of the child, and instructed father's counsel to inform father that he "needs to submit his sample so the department can determine whose child it is."

As of a review hearing held on April 29, 2015, at which father was not present, father had not submitted a sample for testing, but another alleged father—the father of the child's half siblings, and the husband of the child's mother at the time of the child's birth—had done so, and been excluded as the biological father of the child. Father's counsel again requested DNA testing with respect to father; the court reissued its order for paternity testing. The court also set a section 366.26 hearing with respect to the child for August 28, 2015.

Father completed DNA testing on May 6, 2015. The results, dated May 13, 2015, show father to be the biological father of the child, with the probability of paternity stated as "99.99997%."

In a section 366.26 report, filed August 6, 2015, DPSS reported that the child was "a little behind developmentally," but generally happy and healthy, and had adjusted well to his current caregivers, the prospective adoptive parents, with whom he had been placed since December 2014. The report noted the child had a tendency to become upset, cry, and cling to his caregivers in the presence of strangers. It further observed that the

visitations with father had become "inconsistent" since the previous court hearing in April 2015; father had "asked to have visits rearranged when they were scheduled, and on one occasion, cancelled the visit because he could not get a ride . . . ." Moreover, during visits, the child treated father as a stranger, refusing to go to father, and often wanting the caregiver to hold him throughout the visit. As a result, the interactions between father and the child during visits tended "to be minimal at best."

On August 26, 2015, father filed a section 388 petition, requesting that the court vacate the 366.26 hearing scheduled for August 28, 2015, and either place the child with father in family maintenance or grant father reunification services. In the petition, father argued that father had developed a bond with the child, and "believes his son belongs in his biological father's home, where he can be provided the love, structure, and stability needed." (Capitalization omitted.) The trial court ordered that the section 388 petition be heard on August 28, 2015, together with section 366.26 issues.

On August 28, 2015, father was present in court, with his appointed counsel. Through counsel, he requested that the section 366.26 hearing be continued, to allow him to hire a private attorney, because he "very much wants to be given a chance to reunite with his child." Counsel represented that father had first asked counsel to make this request "right before" the hearing. The trial court denied the request for a continuance, finding it to be "untimely" because "father has had ample time to address the needs of his case," including "ample time to bring his own lawyer if he wanted to."

The court also denied father's section 388 petition, finding the requested changes not to be in the child's best interest. The court reasoned that there was "not a very good

showing of bonding or relationship" with father, and noted that "the caregivers who are not the biological parents of this child . . . have shown extreme care and love for this child, and they don't need a DNA test to show that they want to be with this child and take care of this child as mother and father." The court further stated that "we have given the parents sufficient time to show us that they wanted care and custody of this child, and at this time their desire is secondary. The child's need[] for a permanent, stable, loving home is more important."

With respect to section 366.26 issues, the trial court found the child was likely to be adopted, terminated parental rights, and set adoption as the child's permanent plan.

II. DISCUSSION

Father's sole contention on appeal is that the trial court abused its discretion by denying his oral motion for a continuance. For the reasons stated below, we find no abuse of discretion.

Oral requests for continuances made at the section 366.26 hearing are disfavored. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) Section 352 provides that good cause must be shown, and that a noticed motion is generally required; requests must be made at least two court days before the hearing through written notice, with affidavits or declarations detailing specific facts showing that a continuance is necessary, unless the court for good cause entertains an oral motion. (§ 352, subd. (a); Cal. Rules of Court, rule 5.550(a)(4).) In considering whether to grant a request to continue a section 366.26 hearing, the court must give "substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to

a minor of prolonged temporary placements." (§ 352, subd. (a).) "[N]o continuance shall be granted that is contrary to the interest of the minor." (*Ibid.*) We reverse an order denying a continuance only on a showing of abuse of discretion. (*In re Ninfa S.* (1998) 62 Cal.App.4th 808, 811.) "To show abuse of discretion, the appellant must demonstrate the juvenile court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a miscarriage of justice." (*In re Joey G.* (2012) 206 Cal.App.4th 343, 346.)

We find nothing arbitrary, capricious, or patently absurd in the trial court's denial of father's oral request for a continuance so that he could hire private counsel. The request was not written, and was neither filed nor served two days prior to the date set for the hearing, as required by section 352. The motion therefore could only have been "entertain[ed]" if there was good cause for the last-minute oral motion. (§ 352, subd. (a).) No such good cause appears in the record. Father's only stated reason for requesting a continuance to hire new counsel was that he "very much wants to be given a chance to reunite with his child," and, implicitly, that he believed hiring a private attorney would give him a better chance to do so. He made no attempt to demonstrate that this argument could not have been made in the form of a written motion filed and served at least two days before the hearing, pursuant to section 352. As such, the trial court properly denied the motion as untimely. (See *In re B.C.* (2011) 192 Cal.App.4th 129, 144-145 [trial court abused its discretion by granting oral motion for continuance in the absence of a showing of good cause].)

Moreover, even if father's request for a continuance had been timely made, the trial court would have been well within the scope of its discretion to deny it. As noted, father's stated purpose for hiring private counsel was to seek to reunify with the child. By August 2015, however, the time for attempting reunification had long since passed: "Absent a change of circumstances and a motion to reconsider parental status (as could be brought under § 388) the court at the section 366.26 hearing is no longer seeking to reunify parent with child." (*In re Jennifer J.* (1992) 8 Cal.App.4th 1080, 1090.) "A [section 366.26] hearing is concerned only with a long-term placement plan for the child, the preferred alternative being adoption and termination of parental rights." (*In re Ninfa S.*, *supra*, 62 Cal.App.4th at p. 811.) Put another way, father's stated reason for retaining a private attorney was no longer the focus of the proceedings, and was not a consideration that could outweigh the child's "need for prompt resolution of his . . . custody status." (§ 352, subd. (A).)

Moreover, in this case, the court considered father's section 388 petition, filed by his appointed counsel, and denied the petition on the merits, finding that it would not be in the child's best interest to provide father reunification services. Father has not contested that determination on appeal. It is not apparent what more any newly hired private counsel could have done to further father's stated goal.

In arguing that the trial court abused its discretion by denying the requested continuance, father contends "the record shows [he] had a legitimate concern that he needed a different attorney to represent his cause." Specifically, father argues that, once DNA test results were obtained, appointed counsel should have acted more zealously to

have father designated as the presumed father of the child, because "it is upon obtaining presumed father [status] that a biological father may fully participate in reunification." This argument does not, however, take into account the circumstance that father did not submit a sample for paternity testing until May 2015, after the section 366.26 hearing had already been set. By that point, reunification was no longer the goal of the proceedings. (*In re Jennifer J.*, *supra*, 8 Cal.App.4th at p. 1090.) Also, as late as February 2015, father was asserting to the social worker that he had no interest in participating in services. Father's belated complaint about his appointed counsel's purported lack of zeal to establish him as presumed parent therefore rings especially hollow. More to the point, nothing about father's asserted "concern" regarding his counsel's performance requires the conclusion that father established good cause for the requested continuance. Father has demonstrated no abuse of the trial court's discretion.

III. DISPOSITION

The judgment is affirmed.

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HOLLENHORST
J.

We concur:

RAMIREZ
P. J.

MCKINSTER
J.